Supreme Court, U.S.
FILED
NOV 2 2001
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No. 00-6029

In The

Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

vs.

WOLVERINE WORLD WIDE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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QUESTION PRESENTED

The Family and Medical Leave Act of 1993 (FMLA or Act) requires covered employers to provide eligible employees with "a total of 12 workweeks of leave during any 12-month period" for specified reasons, 29 U.S.C. § 2612(a)(1), including leave needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee," 29 U.S.C. § 2612(a)(1)(D). The FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act's substantive provisions. 29 U.S.C. § 2654. The question presented is as follows:

Whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

CORPORATE DISCLOSURE STATEMENT

Respondent Wolverine World Wide, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29(6).

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STATEMENT OF THE CASE

A. This case arose out of a dispute between an employee and her employer over the employee's leave rights under the Family and Medical Leave Act (the "FMLA"), 29 U.S.C. § 2601, *et seq.* The employee, Tracy Ragsdale ("Petitioner" or "Ragsdale"), claims that her employer Wolverine World Wide, Inc. ("Respondent" or "Wolverine"), violated the FMLA when it refused to grant Ragsdale additional medical leave under the FMLA after she had exhausted her company provided 30 weeks (seven months) of medical leave.

Petitioner Tracy Ragsdale began her employment with Wolverine on March 17, 1995. On February 21, 1996, before she had completed twelve months of service with Wolverine, Ragsdale requested leave after her diagnosis of cancer. Wolverine granted her request, and Ragsdale's leave commenced on that date. Wolverine's leave policy allowed employees with six months of service to take unpaid leave for up to seven months (30 weeks). The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Ragsdale requested an extension of her leave on March 18, April 22, May 21, June 20, July 22, and August 15 of 1996. Each request for extension was granted by Wolverine. During the time she was on leave, Wolverine maintained Ragsdale's health insurance benefits, and even exceeded the requirements of the FMLA by paying Ragsdale's portion of her insurance premiums for six months. Wolverine also held Ragsdale's position open for her during the entire 30 weeks of unpaid leave. (Joint App. 83-84).

Ragsdale was terminated on September 20, 1996, because she had exhausted her 30 weeks of company provided leave in full and was unable to return to work. Wolverine never advised Ragsdale that it was designating any of the 30 weeks leave as FMLA leave.[1] On September 26, 1996, Ragsdale returned to Wolverine and requested an additional twelve (12) weeks of FMLA leave. She was informed that she had requested and used all of her available leave and, therefore, Wolverine declined her request. Ragsdale's physician released her to work in December 1996 and she was able to resume full work duties for another employer on December 31, 1996. (Joint App. 83-84).

B. Upon cross motions for summary judgment, the United States District Court for the Eastern District of Arkansas granted Wolverine's motion for summary judgment and dismissed Petitioner's claim that she was entitled, pursuant to the FMLA, to an additional 12 weeks of leave specifically designated as FMLA leave after having exhausted her 30 weeks of company provided medical leave. Subsequent to the Petitioner's motion to alter or amend, the District Court issued a second Order wherein it adopted the Eleventh Circuit's holding in *McGregor v. AutoZone, Inc.*, 180 F.3d 1305 (11th Cir. 1999) (affirming the district court's decision in *Cox v. AutoZone, Inc.*), which found that the DOL's employer notice regulations,

[1] Wolverine never designated any of the leave as FMLA leave because it determined, erroneously, according to the District Court, that she was not an eligible employee since at the time she commenced her leave Ragsdale had not been employed by Defendant for twelve (12) months.

requiring employers to notify an employee that an absence is being counted as FMLA leave before the employer can count the leave against the employee's twelve-week entitlement under the FMLA, invalid because it converts the FMLA's minimum of federally mandated unpaid leave into an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using FMLA leave.

The Eighth Circuit Court of Appeals affirmed the District Court's decision holding the DOL regulation at 29 C.F.R. § 825.700(a)[2] invalid insofar as it purports to require an employer to provide more than twelve weeks of leave. The Court of Appeals found that such a regulation is not a permissible interpretation of the FMLA and is not consistent with the purpose and intent of the FMLA.

SUMMARY OF ARGUMENT

I. Petitioner Tracy Ragsdale took 30 weeks of unpaid leave under Wolverine's sick leave policy. During Petitioner's 30-week leave, Wolverine maintained her

[2] Wolverine had requested that the Eighth Circuit find the DOL's employer notice regulations at 29 C.F.R. §§ 825.208(c) and 825.700(a) invalid since both employer notice regulations are basically the same, except that 29 C.F.R. § 825.208(c) covers paid leave and 29 C.F.R. § 825.700(a) covers paid and unpaid leave. The Court only ruled that 29 C.F.R. § 825.700(a) was invalid without comment on whether 29 C.F.R. § 825.208(c) was invalid, presumably because the employer provided leave at issue here is unpaid.

health insurance benefits and paid her insurance premiums for 26 weeks. Finally, Wolverine kept Petitioner's job open for her for the duration of the 30-week leave period. On September 20, 1996 after the expiration of the 30 weeks, Petitioner was terminated pursuant to Wolverine's sick leave policy, since she was unable to return to work due to her medical condition. Now, after having permitted herself to receive 30 weeks of company provided medical leave, Petitioner contends that she is entitled to an additional 12 weeks of leave, because Wolverine failed to formally and specifically designate her 30-week leave as FMLA leave. To impose such a result on Wolverine would distort the FMLA beyond anything envisioned by Congress.

A. The primary purpose behind the FMLA is to provide eligible employees with a total of 12 workweeks leave for covered family and medical needs. The FMLA reflects a balancing between employees' need to take reasonable leave for medical reasons and the legitimate interests of employers. The total of 12 workweeks leave also represents a carefully crafted compromise by Congress as to the total amount of leave available to employees. To the extent the regulations at issue require an employer to provide more than 12 workweeks of leave within a 12 month period, such regulations conflict with the expressed intent and purpose of the FMLA.

B. Contrary to the expressed provisions of the FMLA, the DOL's employer notice regulations discourage employers from adopting or retaining leave policies more generous than the requirements of the Act. Employers are discouraged from adopting or retaining leave policies more generous than the Act out of concern that they will

be required to provide an additional 12 workweeks of leave, over and above the employer's leave policy, unless the employer specifically and prospectively designates the leave as "FMLA leave." The plain text of the statute and the legislative debate both plainly reveal that the FMLA leave provisions were not intended to burden employers providing leave more generous than that contained in the FMLA.

II. The DOL's employer notice regulations are not entitled to deference since they are contrary to the unambiguously expressed intent of Congress that leave under the FMLA be limited to a total of 12 workweeks. Any view of the FMLA, other than that the twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires, will upset the carefully crafted compromise reached by Congress when it passed the FMLA. Therefore, the regulations are invalid under step one of the *Chevron* test. Moreover, the regulations are invalid under step two of the *Chevron* test, since they are an impermissible construction of the Statute and are "arbitrary, capricious, and manifestly contrary to the statute." To the extent that the DOL employer notice regulations seek to fill a perceived gap in the Statute they are broader than necessary to achieve their purpose, and are punitive to those employers who have provided at least 12 workweeks of leave.

A. Where the intent of Congress is unambiguous, the Agency interpretation of the statute is not entitled to deference. Here the intent of Congress is unambiguous; eligible employees are entitled to federally protected leave for a total of 12 workweeks. The DOL's employer

notice regulations that require more than 12 workweeks of leave are invalid and not entitled to deference.

B. Even if the statute is somewhat ambiguous and left a gap for the DOL regulations to fill, the DOL's employer notice regulations are an impermissible construction of the statute as they are arbitrary, capricious and manifestly contrary to the statute. Following the DOL's employer notice regulations would render nugatory the statute's limitation to a total of 12 workweeks of leave.

C. Where Congress wanted explicit notice provisions, it provided for them in the statute. The DOL's employer notice regulations are not supported by the notice regulations of the statute and change the balance Congress explicitly struck between employers and employees. Further, where Congress felt a penalty was warranted for non-compliance, it provided for a monetary penalty. The DOL's penalty for non-compliance with its employer notice regulations is grossly excessive and directly contrary to the Statute's primary purpose to limit leave to a total of 12 workweeks.

III. The DOL appears to have exceeded the general rulemaking authority granted it by the statute in its promulgation of the prophylactic employer notice regulations.

IV. Even assuming the DOL's employer notice regulations are valid, Wolverine's failure to designate any of the Petitioner's 30-week company provided leave specifically as FMLA leave, did not otherwise interfere with or restrain her exercise of her FMLA rights since she received all the benefits provided for in the FMLA and

since she was unable to return to her position at the conclusion of her leave period, and in fact was not able to return to full duty until more than 10 months after she commenced her leave.

ARGUMENT

I. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS AT ISSUE ARE AN IMPERMISSIBLE INTERPRETATION OF THE FMLA SINCE THE PURPOSE AND INTENT OF THE FMLA IS TO PROVIDE ELIGIBLE EMPLOYEES WITH A TOTAL OF 12 WEEKS OF LEAVE FOR COVERED FAMILY AND MEDICAL NEEDS, AND THE EMPLOYER NOTICE REGULATIONS CONFLICT WITH THAT PURPOSE TO THE EXTENT THAT THEY WOULD REQUIRE AN EMPLOYER TO PROVIDE MORE THAN 12 WEEKS OF LEAVE.

Through the FMLA Congress sought to establish a uniform federal leave policy. The primary guarantee and cornerstone of the FMLA is that all eligible employees should be provided a total of 12 weeks of federally protected leave for covered family and medical reasons. It is the provision of the 12 weeks of leave with which Congress was most concerned. The 12 weeks of leave was a carefully crafted compromise. Congress deliberately selected 12 weeks because it could not get a majority of its members to support a lesser leave period nor a longer leave period. As explained by Representative Ford:

> . . . why 12 weeks and not a longer or shorter time? We started out in the other committee that

> I chaired, the Post Office and Civil Service Committee, with Mr. Clay and Ms. Schroeder and I was pushing a bill that was 26 weeks. . . . But over the years of dealing with this bill, one of the things that people used to attack the bill most often was how do you justify 26 weeks to have a baby? How do you justify 26 weeks to adopt a baby? How do you justify 26 weeks, and we went from one kind of medical emergency to another, and it became a central part of the opposition to the concept of the legislation. And over the years that number was compromised down, and not because 12 weeks made any more sense to the original sponsors of this legislation than 26 – because we could get more people to vote for 12 weeks than we could for 26, and including members of this committee who didn't support the bill at the very beginning but began to support the bill after we modified the number of weeks involved.

(Legislative Hearing on H.R. 1, The Family and Medical Leave Act, Hearing of the Labor-Management Relations Subcommittee of the House Education and Labor Committee, 103rd Cong., 1st Sess., Fed. News Service, January 26, 1993, p. 27).

Because the Department of Labor's ("DOL") employer notice regulations at issue always require unwary employers to provide more than 12 weeks of leave unless the employer specifically notifies the employee prospectively that she is using FMLA leave, the DOL has accomplished through regulation what the congressional sponsors of the FMLA could not – leave in excess of 12 weeks. This is blatantly inconsistent with the purpose and intent of the FMLA.

A. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS CONFLICT WITH THE EXPRESSED INTENT AND PROTECTIONS OF THE ACT.

The terms of the statute contemplate only that the employer will be required to provide a "total" of 12 weeks of unpaid leave. Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA leave. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000). *See* 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a total of 12 workweeks of leave during any 12-month period"); 29 U.S.C. § 2612(d)(1) ("If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation"). Moreover, the statute does not suggest that the 12-week entitlement may be extended. *See Santos v. Knitgoods Workers' Union, Local 155*, 252 F.3d 175, 178 (2nd Cir. 2001) (noting that 29 U.S.C. § 2612(d)(2)(B) "does not create or supplement employer benefits").

In enacting the FMLA, Congress sought to accommodate the important societal interest in assisting families, by establishing a minimum standard for leave. In the FMLA Congress declared that the statute is designed to "entitle employees to take reasonable leave for medical reasons" and to "accomplish [this purpose] in a manner that accommodates the legitimate interests of employers." 29 U.S.C. §§ 2610(b)(2) & (3). The legislation is based on the same principle as the child labor laws, the minimum

wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment. *See* S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6.

Although the Act already contained explicit employer notice provisions, 29 U.S.C. § 2619, containing monetary penalties for an employer's failure to post the required notices, the DOL apparently felt that additional employer notice provisions were necessary.[3] *See* 29 C.F.R. §§ 825.208 and 825.700(a). The DOL promulgated these employer notice regulations ostensibly to require the employer to communicate with the employee regarding FMLA leave. (DOL Brief at 4). Where the employer provides for paid medical or vacation leave in circumstances that would also qualify for FMLA leave, DOL regulations allow for the employee to elect, or for the employer to require, any of the following: (1) that the FMLA leave be taken before the non-FMLA leave is taken; (2) that the non-FMLA leave be taken before the FMLA leave is taken; or (3) that the non-FMLA leave and the FMLA leave be taken concurrently. *See* 29 C.F.R. § 825.207. The DOL regulations place the burden on the employer to determine whether requested leave qualifies as FMLA leave and to designate leave as FMLA-qualifying. *See* 29 C.F.R. § 825.208. Notably, "in all circumstances, it is the employer's responsibility to designate leave, paid or

[3] The DOL's final regulations took effect on February 5, 1996, sixteen days before Petitioner began her leave on February 21, 1996.

unpaid, as FMLA-qualifying, based on information provided by the employee," 29 C.F.R. § 825.208(a)(2), and "the employer must immediately notify the employee that the paid leave is designated, and will be counted as FMLA leave." 29 C.F.R. § 825.208(b). If the employer fails to designate the leave as FMLA leave, the employer may not designate leave as FMLA leave retroactively, and may only designate leave prospectively as of the day of notification to the employee of the designation. In such circumstances, the employee is subject to the full protection of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week leave entitlement. 29 C.F.R. § 825.208(c). The DOL also applies the same principle to unpaid employer-provided leave, stating: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).[4]

Even if the DOL enacted the employer notice regulations pursuant to its statutorily given authority to "prescribe such regulations as are necessary to carry out" the provisions of the Act, 29 U.S.C. § 2654, these regulations go beyond what is necessary to accomplish this purpose. In spite of the statute's explicit expression that eligible employees are only entitled to a total of 12 weeks of

[4] Although 29 C.F.R. § 825.208(c) deals with paid leave and 29 C.F.R. § 825.700(a) deals with paid and unpaid leave, the two regulations are inextricably intertwined for purposes of interpretation of the FMLA.

federally protected leave, following the above DOL-promulgated regulations will in all cases result in an employee receiving greater than 12 weeks leave, unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. Where the employer has provided an employee all the rights conferred on the employee by the FMLA, it should not be found in violation of the FMLA. As the Eighth Circuit properly held, "to find that Wolverine's technical violation of the designation regulations functions as a denial of Plaintiff's FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA." *Ragsdale*, 218 F.3d at 940. *See Fulham v. HSBC Bank USA*, 2001 WL 1029051 at *4-7, 7 Wage & Hour Cas.2d (BNA) 474 (S.D.N.Y. Sept. 6, 2001); *Twyman v. Dilks*, 2000 WL 1277917, at *11-14, 6 Wage & Hour Cas.2d (BNA) 550 (E.D. Pa. Sept. 8, 2000) (the statute's clearly expressed intent is to provide employees with a minimum and a maximum of twelve weeks of statutorily required leave, without interfering with an employer's decision to give more); *Donnellan v. New York City Transit Auth.*, No. 98 Civ. 1096 (BSJ), 1999 WL 527901 (S.D.N.Y. July 22, 1999) (plaintiff received seventeen weeks of leave, which her employer never designated as FMLA-qualified; the court stated that the "plaintiff was denied nothing more than the labeling of her leave as FMLA-qualified"); *Hensley v. Baptist Hosp.*, 1997 U.S. Dist. LEXIS 22515 (E.D. Tenn. Oct. 27, 1997) (defendant not in violation of FMLA even though it failed to classify leave as FMLA-qualifying where the employee was provided all the leave, benefits and other protections contained in the FMLA); *Lacoparra v. Permanent Home Centers*, 982

F. Supp. 213, 221 (S.D.N.Y. Oct. 10, 1997) (employer's failure to notify plaintiff of the requirements of its FMLA policy did not matter where plaintiff received six months of unpaid leave, continuing insurance benefits and reinstatement); *Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 565 (D. S.C. Feb. 20, 1997) (employer's failure to provide notice required by 29 C.F.R. § 825.301 was not a violation of the FMLA where the employee was not deprived of any leave or benefits required by the statute; to do otherwise "would be elevating form over substance"); *Kur v. Fox Valley Press, Inc.*, 1997 WL 89140 at *3-4 (N.D. Ill. Feb. 20, 1997) (dismissing employee's claim that she was entitled to more than 12 weeks of leave without addressing whether the employer had designated the 12 weeks taken as FMLA leave); *Haggard v. Farmers Ins. Exch.*, 1996 WL 146048 (D. Or. Mar. 25, 1996) (employer's failure to provide notice that employee was using FMLA leave not a violation where employee received 14 weeks of leave).

B. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS AT ISSUE DISCOURAGE EMPLOYERS FROM ADOPTING OR RETAINING LEAVE POLICIES MORE GENEROUS THAN THOSE REQUIRED BY THE FMLA.

Significantly, and as noted by the Eighth Circuit, the FMLA states that "nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act." 29 U.S.C. § 2653(b). Although the FMLA sets only a minimum entitlement to a period of up

to 12 weeks of unpaid leave, *see* 29 U.S.C. § 2612(c), the Act does not "diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act. . . . " 29 U.S.C. § 2652(a). In addition, the Act establishes that the minimum entitlement may not be reduced or bartered away for other benefits. *See* 29 U.S.C. § 2652(b). Following such leave, the employee is entitled to reinstatement to his or her former position or an equivalent one. 29 U.S.C. § 2614(a). During his or her FMLA leave, the employee is also entitled to remain eligible for certain employee benefits, including enrollment in the employer's group health plan(s). 29 U.S.C. §§ 2612, 2614.

Just as employers are free to pay their employees more than the minimum wage, employers under the FMLA are free to adopt or retain leave provisions over and above the requirements of the FMLA. After enactment of the FMLA, Wolverine chose to retain its more generous leave provisions. Just like the employer who was already paying its employees the statutorily required minimum wage, the new labor standard (FMLA) did not require Wolverine to provide any additional leave benefits since it already exceeded those mandated by the Act.

Indeed, the FMLA was not designed for employers, like Wolverine, who have leave policies more generous than the FMLA. It was designed for those employers (those "unenlightened" companies as they were referred to by Secretary Reich) who did not see the need in allowing their employees time off for the birth or adoption of a child or for serious health conditions. *See* Statements of

Labor Secretary Robert Reich, Legislative Hearing on H.R. 1, The Family and Medical Leave Act, Hearing of the Labor-Management Relations Subcommittee of the House Education and Labor Committee, 103rd Cong., 1st Sess., Fed. News Service, January 26, 1993, p. 37 ("I did not mean to imply . . . that this legislation will in any way burden enlightened companies. Quite the contrary. Enlightened companies are already doing it [providing family and medical leave]. They will not be burdened at all by something they're already doing. This legislation will simply help them in the sense that they may be burdened right now by the fact that other companies which are less responsible create a climate of distrust among employees generally, which those enlightened companies have a slightly harder time overcoming."). *See also* Statements of Sen. Kennedy, The Family and Medical Leave Act of 1993, Committee on Labor and Human Resources, S. Rep. 103-3, 103rd Cong., 1st Sess., p. 5 (Jan. 27, 1993) ("It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.").

Thus, if an employer only provided its employees with four weeks of leave, the FMLA would provide an additional eight. *See* 29 U.S.C. § 2612(d)(1). However, if

an employer provides leave equal to or more generous than that in the FMLA, the enactment of the FMLA bestowed no additional benefits on that employer's employees. Such is the case here. The enactment of the FMLA bestowed no benefit whatsoever on the employees of Wolverine, since its leave policy was already more generous than the statute.

Contrary to the expressed provisions of the FMLA, the DOL's employer notice regulations discourage employers from adopting or retaining leave policies more generous than the requirements of the Act. Employers are discouraged from adopting or retaining leave policies more generous than the Act out of concern that they will be required to provide an additional 12 workweeks of leave, over and above the employer's leave policy, unless the employer specifically and prospectively designates the leave as "FMLA leave." To allow the Petitioner an additional 12 weeks of leave would, in effect, convert the FMLA from a statute which provides a baseline of 12 weeks federally mandated leave, into a statute which mandates an additional 12 weeks of leave for all employees, even for those employees who already have published, collectively-bargained, well-known employer-provided leave policies that grant benefits equal to or more generous than those in the Act. As the Eighth Circuit held, such an interpretation of the Act is glaringly inconsistent with both the text and legislative intent of the statute. *Ragsdale*, 218 F.3d at 940-41.

II. THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS SHOULD NOT BE GIVEN ANY DEFERENCE SINCE THEY ARE CONTRARY TO THE CLEAR INTENT OF CONGRESS AND ARE ARBITRARY, CAPRICIOUS AND MANIFESTLY CONTRARY TO THE STATUTE.

A. Since The Intent Of Congress Is Clear, The Court Must Give Effect To The Unambiguously Expressed Intent Of Congress, That Leave Under The FMLA Be Limited To A Total Of 12 Weeks.

Although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron v. National Resources Defense Council*, 467 U.S. 837, 842 (1984); *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-126 (2000). "The starting point in every case involving the construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978); *Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In *Garcia v. United States*, 469 U.S. 70, 75 (1984), then, Justice Rehnquist stated for the court, "when we find the terms of a statute unambiguous, judicial inquiry is complete, except in exceptional circumstances."

Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. *See also United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). "If

Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.' " *Food and Drug Administration*, 529 U.S. at 132.

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 133. *Accord Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit if possible all parts into an harmonious whole." *Food and Drug Administration*, 529 U.S. at 133 (Internal citations removed).

A court must not defer when it "appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and "must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

The purpose and intent of the FMLA is readily apparent from the statutory language and from the pertinent legislative history. Under the *Chevron* analysis, the DOL's employer notice regulations at issue are impermissible

and must be struck down as beyond the clearly expressed purpose and intent of the FMLA.

The Statute plainly states that an "eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period. . . . " 29 U.S.C. § 2912(a)(1). "If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. § 2912(d)(1).

The substantive provisions of the statute show Congressional intent to give employers and employees definite benefits. The provisions of the statute specifying that each employee is eligible for a *total* of 12 weeks of leave per year, if the employee has been employed for more than a year, are meant to give employers and employees assurances as to their respective rights. 29 U.S.C. § 2611(2)(A)(ii); 29 U.S.C. § 2612(a)(1). "The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires." *Ragsdale*, 218 F.3d at 937.

An indication of the limited nature of the benefit that Congress intended to grant to employees under the FMLA is shown by the provision of the statute that deals with married couples employed in the same workplace. Anticipating that in some workplaces, both husband and wife are employed and may seek leave for the same FMLA qualifying condition, Congress addressed the situation. Section 2612(f) provides:

> In any case in which a husband and wife are entitled to leave . . . , [and] are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –
>
> (1) [for the birth of a son or a daughter and in order to care for such son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care]; or
>
> (2) to care for a sick parent . . . .

Id.

This provision is instructive with regard to the scope and goals of the FMLA. In the absence of this provision, both the husband and wife would each be eligible to take 12 workweeks of leave any time an event qualifying for leave occurs. Thus, in the case of married employees, the guarantee of 12 workweeks of leave arising from a single event would in effect be converted to 24 weeks of leave. Recognizing the unfairness of this result toward employers in this situation, Congress reduced the possible leave available in the enumerated situations from 24 workweeks to a total of 12 workweeks of leave per qualifying event. This result affirms the FMLA's goals of guaranteeing eligible employees 12 workweeks of medical leave, but it also shows that in practice Congress intended to avoid a situation in which the Statute would award employees with more than 12 workweeks of medical leave.

Similar to the statutory text, the FMLA's legislative history supports the view that the FMLA was intended

only to be a statute that provided a minimum labor standard; an assurance that employers would provide employees with 12 weeks of leave every year.[5] *See* S. Rep. No. 103-3, at 28 (1993), reprinted in U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis."); 103rd Cong. H381 (February 3, 1993) (statements of Representative Clay on the Family and Medical Leave Act) ("[A]s America's work force changes to meet the economic realities of the 1990's, it is critical that the work force adapt to accommodate those changes. The Family and Medical Leave Act, of which I have been a principal sponsor for the past 8 years, will provide a minimum labor standard to ease the new workplace burden of balancing the demands of work and family. We are not mandating anything. What we are doing is imposing a standard of work conditions which is just and fair for our work force. . . . The United States alone stands among all industrialized countries in not having this minimum labor standard for its workers."); 103rd Cong. H387 (February 3, 1993) (statements of Representative Snowe on the Family and Medical Leave Act) ("Members of the House, the Family and Medical Leave Act sends a clear message to employers that minimal leave for family crises is as important as workplace safety standards and minimum wage. Dedicated legislators, like the gentlewoman from

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[5] When interpreting a statute the Court will look at all indicia of legislative intent. *Cass v. United States*, 417 U.S. 72, 77-79 (1974); *United States v. American Trucking Associations*, 310 U.S. 534, 542-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

New Jersey [Mrs. Roukema] and others, have taken pains to ensure that the compromise version of the Family and Medical Leave Act responds to the concerns of the business community. Several safeguards and flexibility measures have been incorporated to protect employers and eliminate potential abuse.").

Any view of the FMLA other than that the twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires will upset the carefully crafted compromise reached by Congress when it passed the FMLA. *See* H.R. Rep. No. 135(1), at 37 (1991) ("The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a 12-week minimum represents a middle ground between the family needs of workers and employer's business needs.").

However, in spite of the text of the Statute and the wealth of legislative comment that 12 weeks was intended to be both the minimum and maximum that an employer would be required to provide, the DOL promulgated regulations that require an employer to provide more than 12 weeks of leave, unless the employer specifically and prospectively informs the employee she is using FMLA leave. According to the regulations, if the employer fails to prospectively inform the employee that the leave she is using is FMLA leave, then "none of the absence preceding the notice to the employee of the [FMLA] designation may be counted against the

employee's 12-week entitlement." 29 C.F.R. § 825.208(c). The DOL regulation at 29 C.F.R. § 825.700(a) basically adopts the language of section 825.208(c) stating that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA, the leave does not count against the employee's FMLA entitlement."

The DOL argues that the FMLA enables the worker, at the outset of leave, to plan his medical treatment or care-giving activities with a degree of confidence that an employer's unilateral leave policy could not provide. The Secretary further argues that the full achievement of that statutory purpose requires that the employee be made aware at the outset of the statutory leave period of his rights and responsibilities under the Act. (DOL Brief at 11). Neither the statute nor the legislative history indicates any concern by Congress that employees be notified so as to be able to plan their use of the leave. Further, a reasonable and good faith reading of the Statute would not lead an employee to believe that she is permitted to plan medical treatments or care-giving activities that will last longer than 12 weeks.[6] To the extent that the DOL employer notice regulations seek to fill this perceived gap in the statute it is broader than necessary to achieve its purpose, and is punitive to those employers who have provided at least 12 weeks of leave.

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[6] Here, however, Petitioner argues that she is entitled to 42 weeks of leave (30 weeks of company provided leave, plus 12 weeks of leave specifically designated as FMLA leave) apparently to plan her cancer treatments.

The controversy surrounding the scope of the FMLA when it was passed adds support to the position that the Department of Labor exceeded the Statute when it issued the employer notice regulations. Looking at the context of the statute is appropriate when considering whether to strike an agency regulation. *See Christensen v. Harris Co.*, 529 U.S. 576, 583 (2000). The FMLA was passed by Congress over the objections of many employers. To address the concerns of employers fearful of a new unrestrained federal mandate, employers were given assurances that this was a limited statute that simply instituted policies that were like those that many of the best employers were already granting.

The purpose of the statute compared to other legislation also militates against the employer notice regulations. The FMLA is not remedial. Thus, unlike other federal employment statutes, it should not be construed broadly to the achievement of remedial goals. The court "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *See United States v. Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (expressing similar concern toward statutes protecting public health). *See also Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (favorably citing *Article of Drug*). Since the FMLA is not construed broadly, it is not appropriate to interpret the statute solely for the benefit of employees. Rather, the statute should be interpreted impartially giving equal deference to all affected parties. If the FMLA is viewed in this way, the employer notice regulations are invalid to the extent they change the balance in the statute between employers and employees.

To the extent the DOL employer notice regulations require employers to provide, or employees to receive, more than 12 weeks of leave, the regulations are contrary to the clear intent of the statute.

B. Even If The Court Finds That The FMLA Is Somewhat Ambiguous And That Congress Left A Gap For The Regulations To Fill, They Must Still Be Held Invalid As They Are An Impermissible Construction Of The Statute.

Under *Chevron*, if Congress has not spoken on the issue and has explicitly or implicitly left a gap for regulations to fill, then the court must consider whether the agency's interpretation of the statute is based upon a permissible construction of the statute. *Chevron*, 467 U.S. at 843-44. *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is "reasonably related to the purposes of the enabling legislation"). Under this second step of the *Chevron* analysis, an agency's interpretation ordinarily is accorded deference, unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *See United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (The agency's construction of the statute is permissible when it is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute).

Recent cases from this Court have shown flexibility in applying *Chevron*. The Court has invalidated agency actions where it found that Congress spoke directly to an issue subject to regulation, and the agency regulation

conflicted with the clear intent of Congress, as well as where Congress left the precise issue open, and the agency action nonetheless went beyond a permissible interpretation of the statute. *Compare Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (finding intent of Congress clear and striking regulations) *with N.L.R.B. v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001) (finding statute ambiguous, but striking regulation as going beyond the limits of the statute). Here, even if the Court finds the FMLA to be somewhat ambiguous, the Court should strike the DOL's employer notice regulations.

A recent Supreme Court case lends support to the invalidity of the DOL's employer notice regulations. In *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S. Ct. 903 (2001), the respondents, a group representing trucking companies, argued that under the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, the EPA had the authority to consider the cost of implementation when it set air quality standards, even though the language of the statute only permits the EPA to consider public health considerations. The respondents argued that, although the cost of implementation was not specifically mentioned in the statute, an implied purpose could be found in the statute to consider implementation costs. *Whitman*, 121 S. Ct. at 910.

The Court found that there was no language in the statute directing the EPA to consider the cost of implementation. Further, to the extent that the authority to consider the cost of implementation was implied from the statute, it would conflict with the specific and explicit provisions of the statute that require the EPA to consider

public health concerns when setting air quality standards. Because of the conflict between the proffered implied purpose of the statute, and the clear intent of the statute, the Court concluded that if Congress had wanted to give life to the implied purpose of considering the cost of implementation, it would certainly have mentioned it if it had meant it to be considered. Since Congress did not mention this purpose, and the purpose conflicts with a stated purpose mentioned, it is invalid. *Whitman*, 121 S. Ct. at 910. The Court found that while the Clean Air Act, was "to some extent ambiguous," the agency's interpretation of the statute went "beyond the limits of what is ambiguous and contradict[ed] what . . . is quite clear." On this basis, the regulation was struck down. *Whitman* stands for the proposition that where an implied purpose of a statute, one not explicitly stated in the text of the statute, is sought to be given effect, and that implied purpose conflicts with the clear intent of Congress, the implied purpose could only be valid if Congress had expressly included it in the statute. *See Whitman*, 121 S. Ct. at 901-910.

Here, the Department of Labor argues that the implied purpose of the employer notice regulations, to aid employees in planning their family and medical leave, is valid and consistent with its authority under the Statute to "prescribe such regulations as are necessary to carry out" the provisions of the Act. *See* 29 U.S.C. § 2654. Both Petitioner and the Department of Labor must admit that the purpose of aiding employees in planning their leave is not mentioned anywhere in the text of the FMLA. Further, the operation of the DOL's employer notice regulations here, creating an open-ended leave entitlement,

conflict with the expressed and primary purpose of the FMLA, granting employees a total of 12 weeks of FMLA leave, as well as Congress' admonition that the statute is not to be construed so as to discourage more generous employer leave provisions.

In *Whitman*, the Court also cautioned against allowing apparent gaps in Congress' directions in a statute to be used by the regulatory agency to render provisions of the statute nugatory in practice. *See Whitman*, 121 S. Ct. at 918. To allow regulations to render express provisions of the statute inoperative "is to go over the edge of reasonable interpretation. The [agency] may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit . . . " the statute's application. *Whitman*, 121 S. Ct. at 918-919. Here, the actions of the employer notice regulations render nugatory the statutory provisions providing a total of 12 workweeks of leave, as well as the provision that the statute will not discourage more generous leave plans.

C. The Department Of Labor's Employer Notice Regulations Are Not Supported By The Notice Provisions Contained In The FMLA.

The regulations ignore the fact that employers in the United States usually provide some private leave benefits. Outside of the somewhat narrow leave benefits provided by the FMLA, employees often have a range of employer provided leave benefits to use in varying circumstances. Both the statute and legislative history reflect Congress' intent to fashion this leave consistent with employers' existing leave policies. The statute was

designed to provide a uniform minimum leave amount, which may or may not require employers to modify the amount of leave provided to employees.

The regulation's assumption that the only way an employee would know how much family or medical leave she had remaining would be if the company formally designates the leave is not appropriate or needed where, as here, the employer has a published leave policy more generous than the FMLA. Not only was Wolverine's policy published in the employee handbook, but it was also contained within the collective bargaining agreement between Wolverine and the employees' union. The policy provided for seven (7) months (30 weeks) of job-protected leave for reasons covered by the FMLA. It also contained other provisions more generous than contained in the FMLA. Because of the publicized and well-known nature of Wolverine's leave policy, after Ragsdale used the first month of leave she was aware, without Wolverine otherwise informing her, that she had six months of leave remaining. Ragsdale was able to plan her leave accordingly.

In addition, the employer notice regulations are not supported by the notice provisions contained in the statute, to the extent that the regulations unfairly penalize employers who fail to give adequate notice to employees that leave is FMLA leave. Where Congress wanted explicit notice provisions with significant consequences, it provided for them. 29 U.S.C. § 2613 (detailing notice requirements for employees seeking leave). In 29 U.S.C. § 2612(e)(1), the statute details notice obligations of employees to employers when the employee requests qualifying leave under the FMLA. *See Carter v. Ford Motor*

Company, 121 F.3d 1146 (8th Cir. 1997) (holding that employee merely informing the employer that he would be out and did not know when he would return and offering no further information was not adequate notice under the FMLA). In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to restore the employee to his or her position. *See* 29 U.S.C. § 2614(b)(1)(B).

The notice provided by Congress in the form of a posting requirement is the required and adequate notice used for most every state and federal employment statute including Title VII, the Americans with Disabilities Act, The Age Discrimination in Employment Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, state Workers' Compensation acts, state wage payment acts, and a number of other employment statutes. It is unclear from the FMLA that Congress intended the DOL to go beyond this statutory employer notice.

Finally, where the FMLA does contain penalties arising from notice violations, it provides for monetary penalties to encourage compliance. *See* 29 U.S.C. § 2619 (assessing monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights). The preference for monetary penalties, like in the Fair Labor Standards Act, is instructive. An obvious alternative to the DOL to ensure that employees

receive notice of their leave rights is to levy monetary sanctions against employers that fail to give notice under the regulations.

With regard to the balance Congress explicitly struck between employers and employees, *see* 29 U.S.C. § 2601(b)(1) & (3) (The FMLA's purpose is to "balance the demands of the workplace with the need of families . . . in a manner that accommodates the legitimate interests of employers."), the employer notice sanctions shift that balance in a manner not intended by Congress. The statutory provisions indicate that Congress intended employees to bear much, if not most, of the notice requirements under the statute. They must request leave, they must provide reasonable notice of the need for leave, and they must satisfy the various certification requirements, which occur several times in the leave process. The DOL's employer notice provisions take the balance that Congress created concerning notice requirements, strip employees of their basic responsibilities under the Act, and make employers the absolute guarantors of employees' rights under the Statute by imposing overbroad penalties for an employer's failure to adhere to its regulations.

Neither the goals nor purposes of the FMLA, nor considerations of possible harmful effects toward employees justify upholding the regulations. There is nothing about the text or goals of the FMLA that would make striking these regulations unfair or improper. Unlike other statutes administered by the Department of Labor, the FMLA is a statute with very specific goals and intent. It was not intended to remedy past abuses. The improper nature of the DOL's employer notice provisions

is outlined by the fact that even as the employer notice provisions upset the balance contained in the statute concerning notice burdens, they sanction employers in a manner that burdens the core provision of the statute; the simple guarantee to eligible employees of a uniform, total of 12 workweeks of family and medical leave. More importantly, the striking of this regulation will not produce a disproportionately negative impact on employees.

III. THE DEPARTMENT OF LABOR APPEARS TO HAVE EXCEEDED ITS RULEMAKING AUTHORITY IN ITS PROMULGATION OF THE PROPHYLACTIC EMPLOYER NOTICE REGULATIONS GIVEN THAT CONGRESS ONLY GRANTED IT GENERAL RULEMAKING AUTHORITY IN THE FMLA.

The Department of Labor characterizes the employer notice regulations (which penalize employers who fail to give timely notice in accordance with their provisions) as "prophylactic" regulations that provide as a categorical matter that otherwise qualified periods of leave will not be counted as FMLA leave if the employer fails to give timely notice that the leave will be so treated. (DOL Brief at 20). The Department of Labor admits that the prophylactic regulations will sometimes place the employee in a better position than if the employer had complied with the regulations. Further, the Department of Labor admits that in this matter the effect of the prophylactic regulations was to create a viable FMLA cause of action where one would not otherwise exist, even though Ragsdale would not have been able to return to work at the end of 12 weeks of leave if notice had been given. (DOL

Brief at 20). The prophylactic notice regulations were chosen because a categorical rule is more predictable and easier to administer than a non-prophylactic rule. (DOL Brief at 20-21).

In support of its argument that the prophylactic regulations here are valid, the Department of Labor cites to cases in which Congress granted administrative agencies remedial rulemaking authority. (DOL Brief at 22-23). Congress can grant regulatory authority in various ways, including both general and specific grants of authority. *Compare* 42 U.S.C. § 2000e-12(a) (granting general authority to the Equal Employment Opportunity Commission to issue "suitable procedural regulations to carry out the provisions of [Title VII]") *with* 15 U.S.C. §§ 78n(e) & 78w(a)(1) (granting the Securities and Exchange Commission general administrative authority, but also giving the Commission the power to define by rules and regulations and prescribe means "reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."). In the FMLA Congress granted its basic regulatory authority, providing that the Secretary of Labor may "prescribe such regulations as are necessary to carry out . . . " the Act. 29 U.S.C. § 2654. This general grant of administrative authority is not the type of grant that will generally support a prophylactic regulation.

The Department of Labor relies on two Supreme Court cases to support its authority to promulgate the prophylactic employer notice regulations. It cites *Mourning v. Family Publications Serv.*, 411 U.S. 356 (1973) and *United States v. O'Hagan*, 521 U.S. 642 (1997), as cases where broad prophylactic regulations were approved by

this Court. (DOL Brief at 22-23). However, the Department of Labor misconstrues the import of these cases. In *Mourning* and *O'Hagan*, Congress had given the respective agencies explicit remedial authority beyond the standard administrative authority. This led to the adoption of prophylactic regulations.

In *Mourning v. Family Publications Serv.*, the Court considered whether the Federal Reserve Board exceeded its administrative authority under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, when it issued rules requiring Truth in Lending disclosures in situations in which there were no finance charges. 411 U.S. at 372. A creditor found in violation of the Act challenged the regulations, arguing that the Truth in Lending Act only applied to situations involving finance charges. *Id.* The Court reviewed the grant of authority given to the Board in the statute. In addition to the general grant of regulatory authority, the statute provided that:

> These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Mourning, 411 U.S. at 361-62, 365-66.

The Court found that the above grant of remedial authority permitted the Federal Reserve Board to issue regulations that might go somewhat beyond the language of the statute. The Court wrote that the grant of remedial authority was made by Congress due to its knowledge

that "adroit and unscrupulous" creditors would try to characterize their transactions "so as to fall one step outside whatever boundary Congress attempted to establish. . . . " The grant of prophylactic authority was intended by Congress to empower the Federal Reserve Board to draft rules that could prevent creditors from evading the statute, no matter what method was utilized. *Mourning*, 411 U.S. at 359-60. Based on this goal, the Court found that the regulations were valid.

The *Mourning* decision stresses two levels by which Congress can give administrative authority. "Where the empowering provision of the statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of the Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " *Mourning*, 411 U.S. at 369 (citing *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81 (1969)). However, where enabling provisions also provide more specific authority to the administrative agency, such as the authority to remedy attempts to evade the purposes of the statute, a greater level of deference to administrative rulemaking exists, rising to an abuse of discretion standard. *Mourning*, 411 U.S. at 370-71 (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 255 (1945)). In *Mourning*, since Congress expressly gave the Federal Reserve Board authority to regulate to prevent evasion of the statute, the Board acted within its authority in promulgating a prophylactic regulation that was broad in its application.

Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), this Court considered the validity of regulations promulgated to enforce fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. *Id*. at 646-47. The regulations in question broaden the reach of the statutory fraud provisions that prohibit a person from engaging in insider trading of stocks, to reach insider traders that have no fiduciary relationship to participants in the offer in question. An attorney prosecuted for fraud challenged these regulations, and the challenge was reviewed by this Court. *Id*. at 649.

As discussed by the Court, the Securities Exchange Act of 1934 contains two grants of rulemaking authority. Section 78w(a)(1) grants the Securities and Exchange Commission (SEC) general rulemaking authority. In addition, the statute contains a more specific grant, which provides that "the [SEC] shall, for the purposes of the [fraud] subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e).

In reviewing the regulation, the Court noted that section 78n(e) "delegates definitional and prophylactic rulemaking authority to the [SEC]." *O'Hagan*, 521 U.S. at 667. "A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited." *Id*. at 672-73.

The Court found the prophylactic rule related to insider trading valid not because of the grant of general rulemaking authority, but rather because Congress, as part of the Securities and Exchange Act, gave the SEC

specific authority to engage in just this sort of rulemaking. *See Id*. at 676 ("Rule 14e-3(a) is a proper exercise of the Commission's prophylactic power under § 14(e)."). This prophylactic power is contrasted from the Commission's general rulemaking power contained in 15 U.S.C. § 78w(a)(1). *See also Gemsco v. Walling*, 324 U.S. 244, 257-58 (1945) (finding valid FLSA remedial regulation based on statutory language directing DOL to "prevent the circumvention or evasion" of wage orders).

Unlike the statutory provisions in *Mourning* and *O'Hagan*, which contained specific prophylactic rulemaking authority, when Congress adopted the FMLA, it gave the Department of Labor the standard agency power to regulate, but it did not give the Department of Labor specific prophylactic rulemaking instructions. The lack of specific prophylactic authority calls into question the authority of the Department of Labor to issue broad prophylactic regulations here. Further, it puts into focus Respondent's argument that the prophylactic employer notice regulations needlessly conflict with the plain text of the FMLA.

The characterization of the employer notice regulations as prophylactic regulations by the Department of Labor is meant, in part, to excuse the fact that the regulations go beyond the plain language of the FMLA. However, characterizing these regulations as prophylactic or categorical does not give the Department of Labor any leeway to promulgate regulations that go beyond the intent of Congress, and which violate the express provisions of the statute. The cases the Department of Labor cites in support of its authority to issue prophylactic regulations here involve statutes that granted the agency

greater authority to regulate than here. These cases do not support the Department of Labor's prophylactic regulation here.[7]

IV. REGARDLESS OF THE VALIDITY OF THE DEPARTMENT OF LABOR'S EMPLOYER NOTICE REGULATIONS, WOLVERINE'S FAILURE TO DESIGNATE PETITIONER'S 30-WEEK LEAVE AS FMLA LEAVE DID NOT OTHERWISE INTERFERE WITH OR RESTRAIN PETITIONER'S EXERCISE OF HER FMLA RIGHTS.

Even assuming the DOL employer notice regulations are valid, Wolverine's failure to specifically designate any of Petitioner's 30-week leave as FMLA leave did not otherwise interfere with or restrain Petitioner's exercise of her FMLA rights. Petitioner received 30 weeks of leave prior to being terminated under Wolverine's sick leave policy, and Petitioner was granted the full benefits conveyed by the FMLA. Moreover, the Petitioner was unable to work at the conclusion of the 30-week leave in September 1996. In fact, Petitioner was unable to return to full-time work until December 31, 1996. Therefore, under the

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[7] Contrary to the Department of Labor's implication in its Brief that Respondent's argument is somehow that the regulations are deficient because it is overbroad (DOL Brief at 22-23), it is Respondent's position that Congress gave the Department of Labor standard agency authority when it drafted the FMLA, and that the Department of Labor exceeded that authority by promulgating unwarranted prophylactic regulations that squarely conflict with the purpose of the statute, to ensure that employers give qualified employees a total of 12 weeks of family and medical leave per year.

circumstances, no relevant consequence attended Wolverine's failure to designate Petitioner's leave as FMLA leave.

The Second Circuit applied the same reasoning to a case in which the plaintiff alleged he had been deprived of proper notice required by the FMLA and DOL regulations, *i.e.*, he was not told that he was limited to 12 workweeks of leave. In *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999), the plaintiff had suffered a serious injury, rendering him unable to perform his job and requiring an immediate, unanticipated leave. The plaintiff was placed on FMLA leave. When, after 12 weeks of unpaid leave, the plaintiff was unable to return to work, he was fired. The district court dismissed the plaintiff's FMLA claim, finding that even if the defendant had failed to provide proper notice to the plaintiff, it did not deny, interfere with, or restrain his exercise of FMLA rights, because the plaintiff had received all of the substantive rights conferred upon him by the FMLA. The Second Circuit affirmed, holding that no rational fact finder could conclude that the plaintiff's exercise or attempted exercise of his FMLA rights was in any way affected by the defendant's failure to inform him that the FMLA entitled him to a leave of up to 12 workweeks. The court reasoned that because the plaintiff's leave was necessitated by an unanticipated medical condition, and because his inability to return to work continued well beyond his 12-week leave, it was impossible for the defendant's alleged failure to give proper notice to have interfered in any way with the plaintiff's exercise of his FMLA rights. *See also Donnellan v. New York City Transit Auth.*, No. 98 Civ. 1096 (BSJ), 1999 WL 527901 (S.D.N.Y.

Jul. 22, 1999) (transit authority did not violate FMLA when it failed to restore employee, who was laid off as part of a reduction in force after having received 17 weeks of leave following her injury, to the position she held prior to layoff, where the right to be restored to the former position only obtains when the employee is able to return to her position at the conclusion of the FMLA leave, and the employee remained unable to return to work until approximately 40 weeks after she had been laid off and more than one year after she had commenced her leave).

Therefore, Respondent did not interfere with Petitioner's rights under the FMLA, since she received all the benefits to which she was entitled under the FMLA and since she was unable to return to her position at the conclusion of her leave period. Here, Petitioner did not return to full duty until December 31, 1996, more than three months after her employment was terminated, and more than ten months after she commenced her leave. Under such circumstances, Respondent should not be said to have interfered with Petitioner's FMLA rights.

CONCLUSION

For the above reasons, Respondent Wolverine World Wide, Inc., respectfully requests this Honorable Court find that the DOL's employer notice regulations at 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a), are contrary to the plain text of the FMLA and go beyond the intent and purpose of Congress in enacting the FMLA, and to the extent they attempt to fill any gaps left by the statute they

are an impermissible interpretation of the statute, and should be held invalid. Furthermore, Wolverine's failure to follow the DOL's employer notice regulations, to the extent they are valid, did not otherwise interfere with or restrain Petitioner's exercise of her FMLA rights.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

29 U.S.C. § 2601 FINDINGS AND PURPOSES

(a) Findings

Congress finds that –

(1) the number of single parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

(3) to accomplish the purpose described in paragraph (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

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29 U.S.C. § 2612 LEAVE REQUIREMENT

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of each employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) and (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of Notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under

such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

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29 U.S.C. § 2613 CERTIFICATION

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2512(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under the subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer,

that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A healthcare provider designated or approved under paragraph 1 shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third healthcare provider designed or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section

(2) Finality

The opinion of the third healthcare provider concerning the information certified under subsection (b) of this section shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

29 U.S.C. § 2615 PROHIBITED ACTS

(a) Interference with Rights

(1) Exercise of Rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with Proceedings or Inquiries

It shall be unlawful for any person to discharge or in any manner discriminate against any individual because such individual –

(1) Has filed any charge, or has caused to be instituted any proceeding, under or related to this subchapter;

(2) Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

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29 U.S.C. § 2619 NOTICE

(a) In General

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

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29 U.S.C. § 2652 EFFECT ON EXISTING EMPLOYMENT BENEFITS

(a) More Protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less Protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

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29 U.S.C. § 2653 ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES

Nothing in this Act or any amendment by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

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29 U.S.C. § 2654 REGULATIONS

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

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29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the

employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying

reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave – consistent with the employer's established policy or practice – and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to

the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent from an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work,

promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

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29 C.F.R. § 825.700(a)

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.